Supreme Court, U.S.
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No. 99-1425

In The

Supreme Court of the United States

DEBORAH M. BORODATY and
DORENE HAZELBAKER,

Petitioners,

v.

WEST PENN POWER COMPANY, INC.,
a Pennsylvania Corporation,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

The claim is one for sexual discrimination and harassment at a work place. The Petitioners, Deborah Borodaty and Dorene Hazelbaker, were employees at the Mitchell Power Station, a power generating plant of the West Penn Power Company, and allege that while employees the company permitted incidents of peeping to occur in the women's locker room area which, when coupled with an inadequate investigation of the alleged peeping, the prevalence of alleged pornographic materials at the plant and a prevalence of jokes, comments and other verbal harassment of the Petitioners, created a hostile work environment. The Petitioners presented testimony that they believed peeping occurred on at least two occasions. Initially, in October, 1991, they became suspicious that someone might be peering down at them in their locker room facility from a dropped ceiling after a female employee questioned another female employee if she had a "feeling of being watched." App.293a[1]. This female employee, who was "management", also explained that there was a door into the ceiling area, above the second floor, to include the area above the women's locker room, but admitted she did not hear any noises or see anything fall from the ceiling, but acted only on that "feeling." App.293a & 544a. As a result, one of the women employees, Carol Levandosky, crawled up a ladder in an air conditioning room off the hallway from the men's and women's locker room areas and, after shining

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[1] Page numbers followed by lower case letters designate pages of the Appendices filed in the Court of Appeals for the Third Circuit.

a flashlight into the ceiling area, proceeded to work her way over boards, walls, duct work and the like to get to that area of suspended ceiling above the women's locker room area. App.296a. The ceiling area above the second floor of the plant was filled with duct work but had no flooring, rather wires suspending those tiles which made up the ceiling, with a "couple" planks of lumber being suspended or positioned on the duct work which could be utilized to crawl in the ceiling area. App.297a. It was the contention of the Petitioners that an employee had accessed the ceiling area and then crawled through the ceiling from one of the access points, across this duct work, utilizing the planks, that employee then pulling back insulation over the shower stalls, the restroom area, and a bench in the locker room where the female employees changed their clothes, so that he or she could peer down through the perforated ceiling tile and watch the women. App.298-299a.

The Petitioners presented testimony, in support of their belief that peering had occurred, that when an inspection was made of the ceiling area one of the female employees found "rags", candy wrappers and cans. App.299a. Petitioners persisted in their belief that a peering had occurred, despite the fact that the first female employee to access the ceiling area found the venture so precarious and so delicate that she could not access the ceiling area above the women's locker room without putting her foot through the ceiling tile. They also persisted in their belief, despite the fact that the Petitioners acknowledged that no on had ever been caught in the act of spying, they never heard rumors of anyone spying or peering down on them before their suspicions were

aroused in 1991 or afterwards, and no one saw anyone gaining access into the ceiling area for any purpose other than a legitimate business reason. App.135a, 249a-253a, 327a, 437a, 518a, 528a. Testimony at trial elicited the fact that the ceiling area was required to be accessed to perform various jobs at the plant, to include asbestos inspection and abatement, control and maintenance of the vents and ducts for heating and cooling, and the installation of speakers so as to accommodate a plant address system. App.436a, 522a-527a, 573a and 620a.

Despite the fact there was no direct evidence of any peering, the same day the women employees voiced their suspicions to management, an investigation was undertaken by West Penn. During the course of that investigation access to the ceiling area was cut off by welding the access panel; employees were interviewed to determine whether or not they had been in the ceiling area and, if so, for what purpose and if they had any knowledge or heard any rumors of peering; an investigator crawled into the area to examine where the peeping was alleged to have taken place and to determine possible area of access, and the perforated ceiling tiles were painted over so as to prohibit the ability of anyone to visualize the ladies through the tiles. App.613a-618a, 620a-621a, 273a-274a, 358a-363a. While it could not be proved or confirmed that peering had taken place, the employer, subsequent to the immediate investigation, replaced the ceiling with solid, rather than perforated, tiles and had a drywall partition – wooden or plywood walls being prohibited in a power plant – erected in the ceiling area so as to completely segregate and wall off the ceiling area above the women's locker room.

While the Petitioners provided testimony to suggest that a possible peeper was overlooked through this investigation, the female employees for the first time suggested there may have been harassment by a certain employee, Ed Rodebaugh, who may have exposed himself to female employees, the employees, when asked to give statements against Mr. Rodebaugh, whom the Petitioners identified in their Complaint as the "peeper", refused to cooperate with the investigation, refused to give statements, and refused to sign statements that Mr. Rodebaugh engaged in harassing behavior against them.

While the Petitioners further attempted to present testimony to suggest that a second incident of alleged "peeping" had occurred in October, 1994, when "lint" was found on a toilet, the Petitioners again presented no direct evidence that any peeping had, in fact, occurred. The only evidence to support Petitioners' suggestion that another incident of peeping had occurred in October, 1994 was dirt found on a toilet. App.244a. Again, there was no testimony that anyone was found or caught peeping or that anyone was found to have been in the ceiling area for any reason unrelated to his or her employment that anyone even had the "feeling" again of someone looking down. When the female employee notified West Penn management in 1994 that there was dirt on the toilet, the management investigated the area above the ceiling to see if there was a way it could be accessed. Finding, to the management's satisfaction, that there was no way to access the ceiling area, management had the female employees examine the area themselves, at which time the Petitioners noted not only that the ceiling tiles had been changed, but that a drywall partition had been

installed to completely segregate the restroom/locker room from other ceiling areas of the plant. The Petitioners, at that time, voiced no dissatisfaction with the investigation in 1994 or the explanation regarding why there was lint on the toilet (work being done on the blower system). App.438a-422a.

In sum, the Petitioners attempted at trial to make out claims of a hostile work environment by suggesting, first and foremost, that they had been the subject of unauthorized peering. Thereafter, they claimed that once this peering had been brought to management's attention, the employer inadequately investigated the same and/or failed to take steps to prevent "peeping" in the future, and permitted the Petitioners to become the subject of jokes, teasing and other humiliating comments by male employees. Petitioners further suggested that pornographic materials were prevalent in the plant and that the peering incident, as well as the alleged inadequate investigation, the pornographic materials and the jokes, teasing and humiliating comments all created a hostile work environment which led to depression, anxiety, problems at home and modification of the Petitioners' work habits to avoid the restroom.

After the close of the Petitioners' case, the Defendant presented a Rule 50 Motion to dismiss the Petitioners' action, in total, to the extent the Defendant believed the Petitioners had not presented a prima facie case of sexual harassment and discrimination through a hostile work environment. While not granting the Motion in total, the trial court did agree that the Petitioners had failed to present sufficient evidence as to any allegations of

unauthorized viewing. To that end, the trial was set to move forward on the Petitioners' other claims for harassment and a hostile work environment. Upon hearing the judge's ruling, the Petitioners decided to withdraw all of their other claims, suggesting the heart and soul of their case was the peeping.

It is important to recall, however, that the Judge's grant of the Rule 50 Motion dealt with the alleged peering itself and did not touch upon the allegations of "inadequate investigation", the pornographic materials, the jokes or other indicia of the alleged hostile environment. The trial court did not grant a Rule 50 as to the Petitioners' entire case, but only to their suggestion that intentional discrimination had taken place as a result of the female plaintiff employees being peered at in the shower facilities through ceiling tiles. The trial court, unlike suggested by the Petitioners, did not rule on the claim for hostile environment based upon claims of lack of promotion, an old boy network, harassing statements and jokes or pornographic materials; nor did the Judge's Order even suggest, as Petitioners claim, that they were prohibited from proceeding with their claim of a hostile work environment based on some alleged ineffective investigation of the Petitioners' suspicions. The only thing that was precluded, via the grant of the Rule 50 Motion, was a claim for sexual discrimination based upon the alleged "unauthorized viewing." See Appendix 1A. To that end, the only issue valid before the Third Circuit was whether there was enough evidence presented to the trial court to make out a claim for an unauthorized viewing, the Respondent believing, to the extent there was no direct evidence of any peering nor any evidence of any

unauthorized or unnecessary access to the ceiling area, that the trial court properly granted Rule 50 Motion that the Third Circuit properly dismissed Petitioners' appeal and that this Petition For Grant Of Certiorari is, likewise, without merit.

REASONS FOR DENYING THE WRIT

A. Writ of Certiorari must not be granted as there are no special or important reasons which would require review by this Court, the matters on appeal being solely evidentiary.

A review of a Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. It would appear that the Petitioners are suggesting that the reasons upon which Certiorari should be granted here are twofold. First, while Petitioners realize that they are essentially asking that an evidentiary question be reviewed and therefore, certiorari will not normally be granted, litigants suggest the Third Circuit deprived them of their right to a jury determination, and on this basis important reasons exist to grant Certiorari. Secondly, they claim review is necessary as the Third Circuit overlooked a portion of the basis for appeal, namely ineffective investigation. A review of the record in this matter, however, suggests both bases are without merit.

This is a case wherein the Petitioners allege sexual discrimination at the work place. First, they claim there was an unauthorized peering of them while in the shower facilities. Second, they allege that their employer did not

properly investigate their complaints and created a hostile environment by that failure. Further, they permitted male employees to have pornographic materials in the plant and to engage in demeaning behavior including the proliferation of sexual specific statements and jokes throughout the facility. It is important to recall that the trial court, when granting the Rule 50 Motion, granted it only as to the Petitioners' claim as to the alleged unauthorized peering. The trial court was prepared to permit Petitioners' claim of sexual harassment to go forward on the second basis, that of the claimed failure to investigate, jokes, materials and the hostile work environment created thereby, *but the Petitioners chose not to proceed on that basis.* The only evidentiary ruling made by the trial court dealt with the alleged peering. It was the finding of the trial court, and rightly so, that the claims of peering were based on nothing more than speculation, so that for the trial court to permit a jury to decide if, in fact, a peering had taken place, would be to permit the jury to do nothing more than guess. To that end, there is nothing which would suggest any special or important reason for the grant of certiorari. Rather, the trial court in its ruling simply prohibited a claim to proceed to the jury which, in the trial court's opinion, was based solely on supposition and would have required the jury to engage in speculation in order to support Petitioners' claims. In short, a matter of evidence must be left to trial courts.

As was noted by the trial court and the Third Circuit, the Petitioners' claims that there had been unauthorized peering at them through the ceiling persisted despite the

fact that no employee, male or female, had ever been caught peering at the women employees.

Petitioners seem to suggest, however, that as the Rule 50 Motion was granted and that portion of their claim was taken from the jury, that this basis, in and of itself, coupled with the fact that the claim was for sexual harassment and, therefore, a federally based claim is sufficient to warrant the grant of certiorari. There is nothing, however, about the Petitioners' claim which places it beyond and above the ordinary and require this Court to accept the Petition. While Petitioners may certainly feel that they have had, and will have, no outlet for their alleged complaints, nothing could be further from the truth. In fact, although their claim for the alleged "peering" under a harassment theory may have been disposed of by the trial court, Petitioners have a pending State Court claim which addresses the same issues and which would provide an outlet for compensation if, in fact, warranted.

While Petitioners point to the totality of the circumstances to argue the grant of certiorari is necessary, it was the Petitioners themselves who chose not to proceed upon the claims of harassment due to the investigation of the event, pornographic materials, alleged failure to promote, and harassing jokes. Petitioners, rightly or wrongly, believed that their claim as to the alleged peering was the standard bearer of their case, for the Petitioners now to suggest that the totality of the circumstances requires review by this Court, is nothing more than a backhanded attempt by the Petitioners to pick up the pieces of what they have left behind. It was Petitioners' own desire not to proceed to a jury on their sexual harassment claim

based upon the claimed hostile environment which prohibited the jury from considering these issues. Petitioners are, therefore, disingenuous in making any argument to this Court that certiorari must be granted because of the totality of those circumstances.

Further, it is equally disingenuous for the Petitioners to assert that certiorari must be granted here because of any claimed lack of investigation or any claimed failure on the part of the employer to address Petitioners' claims. Again, first and foremost, Petitioners chose not to proceed on that basis to the jury and cannot now rewrite that history. Furthermore, even if this Court were to accept that the trial court granted the Rule 50 Motion not only as to the peering but to the investigation, evidence in the lower court had shown that when the Petitioners first addressed their belief that a peering might be occurring to management, management took immediate steps not only to have the claims investigated but to insure appropriate remedial measures – assuming the peering took place – by immediately welding the access panel to the ceiling area and painting the ceiling tiles so as to make it impossible for any unauthorized viewing through the small perforations in the ceiling tiles. The ceiling area was later segregated all together through the construction of a drywall partition and the ceiling tiles were replaced.

Of the claimed second incident of peering some three years later, when the Petitioners notified their employer of their concerns, the company had management employees look to determine the integrity of the drywall partition and the ceiling tiles, encouraging and requesting the Petitioners themselves view the area above the ceiling tile and voice any continuing concerns after that

examination. In sum, an investigation was undertaken and corrective measures addressed with the purpose of preventing any further peering, assuming it had even occurred.

While the Petitioners suggest, under the Third Circuit case of *Knabe v. Boury Corp.*, 114 F.3d 407 (3d Cir. 1997), that certiorari must be granted as no investigation was undertaken, not only is the evidence to the contrary, but the Third Circuit in *Knabe* makes it clear that it is not whether the investigation is adequate or that the employer's action, to include any remedial action, is adequate, but whether it is seen to reasonably address the claimed harassment. Here, evidence had shown that the employer had undertaken remedial action which could reasonably be termed adequate, questions of the adequacy of this evidence again not dealing with so important or unusual an issue as to require grant of certiorari in this case.

The question of the adequacy of the remedial action begs the question that the alleged peering had occurred and must lead one back to the question of whether or not there was adequate evidence of the alleged peering. This is an unusual case as, almost as a matter of course, the plaintiff is able to make out the first element of a sexual harassment claim, intentional discrimination because of his or her sex, through his/her own direct testimony. A plaintiff is able to testify that he/she was subject to some harassment during his/her employment, pointing to specific acts or comments by specific employees, whether they be co-employees or management. While the accused co-employee or manager might deny that the acts ever

occurred and the question becomes one of credibility for the jury, the plaintiff, to make out a prima facie case, need only provide his/her testimony that the act occurred. Here, the basic problem with the alleged peering or peeping is that neither of the Petitioners, and, in fact, none of the Petitioners' witnesses, could testify that the peering or peeping took place. They could, at best, only testify as to their "speculation" that peering or peeping had taken place as a result of their belief that there was access to an area in the ceiling of the shower/restroom which provided an opportunity for such peeping. Simply put, there was no direct evidence of any intentional discrimination as a result of any peeping, so the Petitioners, in their case in chief, were simply unable to make out – that with regard to the allegations of peeping alone – intentional discrimination had taken place. As such, one must further question if any alleged failure to "adequately" or "properly" investigate an event which cannot be proved to have occurred can be the basis for any sexual harassment or hostile work environment claim. None of the cases cited by the Petitioners address this issue, all of those cases involving the typical situation where prima facie evidence of a discriminatory event was proved by direct testimony. This query aside, testimony showed an investigation was conducted to address the Petitioners' concerns, and the simple fact that Petitioners ultimately became unhappy with its results, because no one was caught in the act or confessed and was disciplined, does not render this case one for review by this Court.

The finding of the lower court – that the evidence submitted by the Petitioners of the claimed peering was simply not adequate to permit the issue to go to the jury

on anything other than a speculative basis – was well founded. The Petitioners' claim of opportunity and motive do not an act of intentional discrimination create. Petitioners' outrage that they may have been looked upon while in the locker facility simply is not adequate evidence that the alleged peering actually took place, and this lack of evidence, particularly when coupled with the Petitioners' own decision not to proceed to the jury, is simply not a proper basis for this Court to accept certiorari.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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Judgment entered in lower court case at page 27 of Appellants' Brief 1A

United States District Court

Western DISTRICT OF Pennsylvania

DEBORAH M. BORODATY
and
DORENE HAZELBAKER

v.

WEST PENN POWER
COMPANY, INC.,
a Pennsylvania
Corporation

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
C.A. 97-163

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment as a matter of law entered in favor of Defendant West Penn Power Company, Inc. and against Plaintiffs Deborah M. Borodaty and Dorene Hazelbaker as to Plaintiffs' allegations of unauthorized viewing.

Plaintiffs Deborah M. Borodaty and Dorene Hazelbaker withdraw all remaining claims against Defendant West Penn Power Company, Inc.

Approved:

/s/ Alan N. Bloch
United States District Judge

/s/ James A. Drach
Clerk

DEC 8 1998
Date

/s/ Illegible
(By) Deputy Clerk